

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DANNY MCDOLE,

Plaintiff-Appellant,

v

CITY OF SAGINAW and CITY OF SAGINAW  
POLICE & FIRE PENSION BOARD a/k/a CITY  
OF SAGINAW TRUSTEES OF THE  
RETIREMENT SYSTEM BOARD,

Defendants-Appellees.

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UNPUBLISHED

May 15, 2012

No. 303770

Saginaw Circuit Court

LC No. 10-010637-NZ

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Danny McDole appeals as of right the trial court's order granting summary disposition in favor of City of Saginaw ("the City") and City of Saginaw Police & Fire Pension Board a/k/a City of Saginaw Trustees of the Retirement System Board ("the Board"). We affirm.

McDole was employed by the City until he was terminated in February 2006. McDole successfully brought a race discrimination suit against the City. On June 10, 2010, McDole applied for service retirement, requesting duty disability retirement. The Board denied McDole's application because he was not a member of the retirement system and thus was "ineligible to apply for a pension." As a result, McDole filed suit against the City and the Board.

The City and the Board moved for summary disposition.<sup>1</sup> The trial court granted summary disposition and found that McDole failed to state a claim against the City upon which relief could be granted<sup>2</sup> and failed to present evidence that the Board's decision was inappropriate.<sup>3</sup> The trial court also determined that judicial estoppel precluded McDole's case.

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<sup>1</sup> MCR 2.116(C)(8) and (C)(10).

<sup>2</sup> MCR 2.116(C)(8).

<sup>3</sup> MCR 2.116(C)(10).

McDole argues that the trial court erred in granting summary disposition in favor of the City because the City and the Board are the same entity. Thus, the City was a proper party. We disagree.

This Court reviews a trial court's decision to grant summary disposition de novo.<sup>4</sup> Appellate review is limited to the evidence the trial court had at the time the motion was decided.<sup>5</sup> "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim upon which relief may be granted."<sup>6</sup> Summary disposition under this subrule is appropriate when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."<sup>7</sup> All factual allegations supporting the claim are accepted as true and construed "in a light most favorable to the nonmoving party."<sup>8</sup> The trial court must also consider "any reasonable inference[s] or conclusions that can be drawn from the facts."<sup>9</sup>

We find that the City and the Board are two separate legal entities. The City's Code of Ordinances, chapter 16, addresses the police officer and firefighters retirement system. Saginaw Code of Ordinances, § 16.04 provides that the Board shall consist of five members including the mayor, the city manager, a police officer, a firefighter, and a duly registered tax-paying elector of the City. McDole argues that the City and the Board are not separate and distinct entities because four of the five Board members are City officials. McDole, however, has failed to demonstrate how membership on the Board equates to the City and the Board being the same entity. In fact, the ordinances governing the Board give the Board autonomous power. Therefore, summary disposition was proper.<sup>10</sup>

McDole also argues that the trial court erred in granting summary disposition<sup>11</sup> in favor of the Board because the Board was contractually obligated to provide benefits to qualified members. McDole further contends that, but for the City's discrimination, he would have been a qualified member. We disagree.

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<sup>4</sup> *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009).

<sup>5</sup> *Id.* at 475-476.

<sup>6</sup> *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009) (quotation marks omitted).

<sup>7</sup> *Id.* at 689-690 (quotation marks omitted).

<sup>8</sup> *Id.* at 689.

<sup>9</sup> *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008).

<sup>10</sup> MCR 2.116(C)(8).

<sup>11</sup> MCR 2.116(C)(10).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.”<sup>12</sup> “[A] trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable” to the nonmoving party.<sup>13</sup> “[T]he moving party is entitled to judgment as a matter of law” if “the proffered evidence fails to establish a genuine issue regarding any material fact.”<sup>14</sup>

We review “a lower court’s review of an administrative decision to determine whether the lower court applied the correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency’s factual findings[.]”<sup>15</sup> The trial court’s “decision will only be overturned if this Court is left with a definite and firm conviction that a mistake was made.”<sup>16</sup> When reviewing an administrative agency’s decision, the trial court must review the entire record for “competent, material, and substantial evidence” that supports the agency’s decision.<sup>17</sup> “If there is sufficient evidence, the [trial] court may not substitute its judgment for that of the agency, even if the court might have reached a different result.”<sup>18</sup> Only agency decisions that are “contrary to law, . . . arbitrary, capricious, or a clear abuse of discretion, [and not] supported by competent, material and substantial evidence on the whole record” will be overturned.<sup>19</sup>

Saginaw Code of Ordinances, § 16.07 provides in pertinent part:

(A) *Membership of the retirement system.*

(1) The membership of the retirement system shall consist of all the defined benefit police officers and firefighters who are in the employ of the City.

(2) In any case of doubt, the Board of Trustees shall decide who is a member of the retirement system within the meaning of the provisions of this chapter.

(B) *Termination of membership.*

(1) Except as otherwise provided in this chapter, should any member cease to be a police officer or firefighter in the employ of the City, for any reason except

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<sup>12</sup> *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *VanZandt v State Employees’ Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 588.

<sup>18</sup> *Id.* at 584.

<sup>19</sup> *Id.* at 583.

his or her retirement, he or she shall thereupon cease to be a member and his or her credited service at the time shall be forfeited.

We find that the evidence supports the Board's determination that McDole was not a member of the retirement system when he applied for duty disability retirement. McDole's employment with the police department terminated in February 2006. In December 2006, McDole withdrew the contributions he made to the retirement system. McDole then applied for duty disability retirement over three years later in June 2010. Thus, the Board's decision that McDole was not a member of the retirement system at the time he applied for benefits was not "arbitrary, capricious, or a clear abuse of discretion" and was "supported by competent, material and substantial evidence on the whole record."<sup>20</sup> Additionally, McDole's assertion that the Board's decision was related to the City's discrimination lacks merit. Not only has McDole failed to provide any evidence to support this argument, but as explained above, the City and the Board are two separate entities so any alleged wrongdoing by the City cannot be imputed on the Board. As such, reversal is not warranted.<sup>21</sup>

Finally, McDole contends that his suit is not precluded by judicial estoppel.<sup>22</sup> Because we found that the trial court properly granted summary disposition regarding McDole's claims against the City and the Board, it is not necessary that this issue be addressed.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994).